UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

GEOFFREY J. WALDAU. Appellant,	)	DOCKET NUMBER DC-0752-91-0393-M-1
v.	)	
	)	DATE: JULY 29, 1994
U. S. POSTAL SERVICE Agency	)	

Geoffrey J. Waldau, Baltimore, Maryland, pro se.
Janet E. Noble, Esquire, Washington, D.C., for the agency

BEFORE

Elizabeth B. Bogle
Administrative Judge

INITIAL DECISION

The Appellant appealed to the Board from a September 17, 1990, decision of the agency to remove him from the position of Operations Analyst Principal, EAS-25, Operations Systems and Performance Department, National Headquarters. The appeal was dismissed for a lack of jurisdiction based on the finding that the appellant was not an employee who was entitled to appeal to the Board. The U.S. Court of Appeals for the Federal Circuit, vacated that decision in part, reversed in part, and remanded the case for a new determination of the appellant's status as an employee entitled to appeal to the Board. *Waldau v. Merit Systems Protection Board*, No. 93-3152 (Fed.Cir., March 16, 1994). For the following reasons, the appeal is again DISMISSED.

to have the right to appeal to the Board under 5 U.S.C. chapter 75, an employee of the U.S. Postal Service must: (1) be a preference-eligible employee, a management or supervisory employee, or an employee engaged in personnel work in other than a purely nonconfidential clerical capacity; and (2) have completed one year of current, continuous service in the same or similar position. See 5 U.S.C. §. 2108 and 7511(a)(1)(B); 39 U.S.C. §. 1005(a). At issue is the appellant's status as a management employee or an employee engaged in personnel work in other than a purely nonconfidential clerical capacity.

Management employee

Management employees are those who formulate and effectuate management policies by expressing and making operative the decisions of their employer. *Id.* slip op. at 7-8. An employee can qualify as management by demonstrating either that he actually has authority to take discretionary actions or that he recommends discretionary actions that are implemented by others possessing actual authority to control employer policy. *Id.* slip op. at 8. An employee need not show that he possessed final signatory in order to demonstrate his management status. *Id.* slip op. at 9-10. The lack of signatory authority may be relevant to the employee's job authority, but it may not be used to assess an employee's managerial status based on recommending discretionary actions. *Id.* slip op. at 14-15.

The court held that the Board erred "by considering that [the appellant] lacked signatory authority over any of the decisions on which he allegedly made the policy recommendations that were rendered "'effective' by management's acceptance thereof." *Id.* slip op. at 15. It therefore vacated the Board's decision concerning the appellant's management status and remanded for the application of the correct legal standard to the facts of this case. *Id.* at 16. The court instructed the Board to focus on the history of the agency's actual reactions to the appellant's recommendations, the nature of those recommendations, and whether that history so aligned

the appellant with management as to confirm his status as a manager. *Id.* at 17.

The appellant was an Operations Analyst Principal in the agency's Operations Systems and Performance Department. He was supervised by Michele A. Denny, Director, Office of Operations Performance, and Lizbeth J. Dobbins, General Manager, Operations Performance Division. As described by Denny and Dobbins, the office was responsible for analyzing the operating functions of the Postal Service. The appellant was one of approximately ten operations analysts on the staff, and they performed primarily analytical work. Ms. Denny and Ms. Dobbins would assign the appellant an issue for study, and he would perform analyses and projections which were used to describe improvements that could be made in the operating functions of the agency. The only discretion exercised by the appellant was the determination he would make concerning what data was needed to perform the study. Because he was a senior analyst, the appellant worked independently, but always under the supervision of Denny or Dobbins. According to Ms. Dobbins, the appellant did occasionally offer gratuitous recommendations, but this did not change the nature of the position. Using information developed by the studies completed by the appellant and other analysts, agency managers would make decisions. See testimony of Dobbins and Denny.

In written submissions to the Board and in his testimony at the July 9, 1992, hearing in this case, the appellant described policy decisions he claimed to have made. See appellant's April 2, 1991, submission at 3-4, transcript at 6-14. It was clear, however, that consistent with the testimony of Denny and Dobbins, these "policy decisions" concerning the manner in which he decided to study various issues that had assigned him and occasionally included recommendations that were beyond the scope of his assignment.

The appellant, I conclude has not shown that he actually had authority to take discretionary actions for the agency. While he has shown that he recommended discretionary actions that were implemented by others, those recommendations were either

the end result of work assigned him by an agency manager or were gratuitously made. Neither circumstances supports a finding that the appellant was aligned with agency management. No basis for changing this conclusion is shown by the fact that the appellant made recommendations that were accepted by agency managers. That the appellant made recommendations that were relied upon attests, instead, to his skill as an analyst. Upon reexamination of the appellant's evidence, excluding from consideration the appellant's lack of signatory authority, I conclude that the appellant has failed to meet his burden of proving that he was a management employee who was entitled to appeal to the Board.

Employee engaged in personnel work

The court held that on remand the Board must consider whether the appellant's evidence established that he was an employee engaged in personnel work in other than a purely nonconfidential clerical capacity under 39 U.S.C. § 1005(a)(4)(ii). *Id.*, slip op. at 22. The court observed that "[f]rom the face of this standard, mere access to, or clerical manipulation of, personnel data, without more, would provide insufficient basis for classifying an employee as confidential under [that section]." Id.

The appellant's claim that he was an employee engaged in personnel work was based on duties he performed in connection with labor relations matters. According to the appellant's testimony, he participated in labor-management contract negotiations in the years 1985, 1987, and 1990, and worked on issues related to those negotiations at other times. He conducted a rural carrier compensation study in 1985 which required access to confidential personnel data, and he updated the study for the 1987 and 1990 negotiations.

Despite the appellant's claim that he was a participant in contract negotiations, it was clear from his testimony and from the testimony of other witnesses that the appellant was never a member of the management negotiations team in any of the years

1985, 1987, or 1990. All witnesses agreed that during the arbitration that arose out of the 1985-86 contract negotiations, the arbitrator ordered a study of rural carrier compensation. The appellant assisted in the development of the study and served as the "numbers expert" to explain the methodology used in the study. See testimony of Frank Kreiner. The study was completed in 1986, and updated in following years, but it does not appear to have been used in contract negotiations.

Based on the above, the appellant's role in labor relations matters appears to have been consistent with his analyst duties rather than with the duties of an employee engaged in personnel work. His access to confidential personnel data for the purpose of designing the rural compensation study is insufficient basis for classifying him as a confidential employee. Other than his participation on this study and its updates, the appellant has not shown that he was engaged in any substantial amount of personnel work.

Finally, even if the appellant had shown that his 1985 participation in the arbitrator-ordered study should qualify him as an employee engaged in personnel work, it has not been disputed that after a 1989 reorganization placed the appellant under the supervision of Ms. Dobbins, the office was no longer involved in labor-management negotiations. Thus, at the time of appellants removal in 1990, the appellant's previous participation in labor relations would not establish that he was then an employee engaged in personnel work. For all these reasons, I conclude that the appellant has failed to meet his burden of proving that he was an employee engaged in personnel work who was entitled to appeal to the Board.

Application of *McCandless*

In its decision remanding this case to the Board, the court instructed the Board to "be mindful of the impact of this court's recent decision in *McCandless v. Merit Sys. Protection Bd.*. 996 F.2d 1193, 1201 (Fed.Cir.1993), on both the Board's decision in *Anmuth v. United States Postal Serv.*, 45 M.S.P.R.

656, 660 (1990), *aff'd without op.* 932 F.2d 980 (Fed.Cir. 1991), and the determination of [the appellant's] status as either a management or a confidential employee." Id. slip op. at 23-24.

In *McCandless*, the court held that, in enacting the Postal Employees Appeal Rights Act (PEARA), 39 U.S.C. § 1005(a)(4)(A), Congress intended that the employees excluded from the collective bargaining units, i.e., ineligible by law for membership in such units, under the jurisdiction of the National Labor Relations Board would have appeal rights to the Board. *McCandless v. Merit Sys. Protection Bd.*, 996 F.2d at 1201. The appellant appears to argue that *McCandless* affords him appeal rights to the Board both because he is ineligible by law from membership in a bargaining unit and because he is not part of an existing bargaining unit and therefore does not have grievance rights.

Because the appellant has not met his burden to establish that he is a management employee or an employee engaged in personnel work, he has not demonstrated that he is among the categories of employees expressly excluded by statute from membership in a collective bargaining unit. See 39 U.S.C. § 1202. In order to show that employees in comparable positions have formed bargaining units, the agency presented the testimony of Richard Kingsbury, Business Systems Manager, Minneapolis Service Center. Mr. Kingsbury testified that he manages a team of analysts and programmers who maintain postal payroll systems. According to Mr. Kingsbury, these employees have access to payroll data and have written programs for use in labor management negotiations yet they are members of a bargaining unit. Because the appellant has not shown that he is expressly excluded by statute from membership in a bargaining unit and based on the agency evidence that other analysts are members of a bargaining unit, I conclude that the appellant has not shown that he is ineligible by law from membership in a bargaining unit.

The appellant's argument that he nevertheless has appeal rights to the Board because he is not a member of an existing bargaining unit rests on the assumption that all Postal Service

employees must be afforded either grievance rights based on their membership in a bargaining unit or appeal rights to the Board. In its brief on the issue of the application of *McCandless*, the agency pointed out that the legislative history of the PEARA does not support such a conclusion. In fact, both the House and the Senate specifically recognized that there would exist group of employees who did not have grievance rights because they were not currently members of a bargaining unit and who would not be afforded appeal rights by PEARA. See agency's May 20, 1994, brief at 7-10. The appellant, I conclude has not demonstrated that *McCandless* affords him a right of appeal to the Board because he is not currently a member of a bargaining unit and therefore has no grievance rights.

DECISION

The appeal is dismissed.

FOR THE BOARD

Elizabeth B. Bogle
Administrative Judge

United States Court of Appeals for the Federal Circuit

NOTICE OF ENTRY OF
JUDGMENT WITHOUT OPINION

JUDGMENT ENTERED: March 13, 1995

The judgment of the court in your case was entered today pursuant to Rule 36. This Court affirmed the judgment or decision that was appealed. None of the relief sought in the appeal was granted. No opinion accompanied the judgment. The mandate will be issued in due course.

Note: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

Judgment

ON APPEAL from the MERIT SYS PROTECTION BOARD
in CASE NO(S) DC0752910303-M-1
This CAUSE having been heard and considered it is ORDERED and ADJUDGED:

Per Curiam (ARCHER, Chief Judge, MICHEL and CLEVENGER, Circuit Judges):

AFFIRMED. See Fed. Cir. R. 36.

DATED MAR 13, 1995 Francis X. Gindhart, Clerk

ISSUED AS A MANDATE: May 4, 1995

§ 1005. Applicability of laws relating to Federal employees

(a)(4)(A) Subchapter II of chapter 75 of title 5 shall apply --

(i) to any preference eligible in the Postal Service who is an employee within the meaning of section 7511(a)(1)(B) of such title; and

(ii) any other individual who --

(I) is in the position of a supervisor or a management employee in the Postal Service, or is an employee of the Postal Service engaged in personnel work in other than a purely nonconfidential clerical capacity; and

(II) has completed 1 year of current continuous service in the same or similar positions.

Amendments

1987 -- Subsec. (a)(4). Pub. L. 100-90 added par. (4)